No. 87-1276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

H-CHH ASSOCIATES, a California limited partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation
Petitioners,

v.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, doing business as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and OZRO ANDERSON,
Respondents.

On Petition For A Writ Of Certiorari To The California Court of Appeal, Second District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The petitioners herein are owners and lessors of a mall in Pasadena, California, which is heavily subsidized by the taxpayers of Pasadena. Their petition has been brought to this Court at a preliminary stage in the litigation below without a full factual record upon which this Court could base a decision. Nevertheless, the question sought to be presented by petitioners is whether the least restrictive means test should apply to them in this instance.

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STATUTES INVOLVED

United States Constitution, Amendment V, which provides:

No person shall . . . be deprived on life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, which provides:

No State shall . . . deprive any person of life, liberty, or property, without due process of law;

California Constitution, Article One, Section Two, which provides:

Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of his right. A law may not restrain or abridge liberty of speech or press.

California Constitution, Article One, Section Three, which provides:

The people have the right to instruct their representatives, petition government for redress of grievances, and

assemble freely to consult for the common good.

STATEMENT OF THE CASE

Respondents Pasadena Citizens for Representative Government (the "Citizens") is broad-based, non-partisan organization of Pasadena taxpayers. At the time this action was filed, the Citizens were circulating an initiative petition to have a mayor city attorney, city clerk, and city controller elected at-large in the City of Pasadena. The Citizens sought to gain approximately 5,600 valid signatures by January 20, 1986, in order to qualify the initiative for the following June, 1986, election.

Petitioners H-CHH Associates, doing business as Hahn Property Management Corporation ("Hahn") are the owners and lessors of the Plaza Pasadena Shopping Center (the "Plaza") located in the City of Pasadena. The Plaza is a two-story enclosed structure with an interior court which runs the length of the mall. The

Plaza has been heavily subsidized by the taxpayers of the City of Pasadena, including, inter alia, taxpayer-funded construction of the parking which is essential to the Plaza's operation.

On December 19, 1985, the Citizens' attorneys attempted to apply for permission to seek signature for their initiative petitions and solicit contributions in the Plaza from 5:00 p.m. to 7:00 p.m. on December 23, 1985. The Plaza's manager gave the Citizens' attorneys an application form and written "Rules for Political Petitioning on Shopping Center Property" (the "Rules"). However, the manager refused to process the Citizens' application. The basis for that refusal was a purportedly-recently adopted, unwritten and personal rule that there could be no political activity in the Plaza during the holiday season.

When the Citizens indicated they believed the absolute ban on political activity was constitutionally impermissible, Hahn sought and obtained a temporary restraining order on December

23, 1985. The trial court at that time acknowledged that there was no evidence that political petitioning by the Citizens would disrupt holiday activities at the Plaza. Nevertheless, the trial court stated that private shopping centers have a right to adopt regulations concerning free speech and petition activity and therefore granted the requested injunction.

Subsequent to the granting of the temporary restraining order, the Citizens applied for permission to petition at the Plaza, following the holiday season, and indicated a willingness to cooperate with Hahn to ensure that their free speech activities would not disrupt the normal business operations of the Plaza. Nevertheless, the Citizens remained unable to engage in such political activity because Hahn insisted upon enforcing its overbroad rules, as well as various other impermissible unwritten limitations.

The trial court entered a preliminary injunction restraining the

Citizens (along with its "officers, members, employees, and agents"), the individual defendants (and their agents and servants), and all persons acting in concert with them, from engaging in "any political activity" at the Plaza, unless an application from permitting the activity has been approved in advance by same. The trial court attempted its own ad-hoc fixing of the Plaza's rules to conform to the requirements of the California Constitution. The trial court thus enjoined the Citizens from engaging in "political activities" unless they fully complied with the Plaza's Rules, save for three exceptions: that the Citizens could solicit contributions and could approach persons in the Plaza for signatures or contributions, and that the Plaza could not regulate the "political content" of any sign, poster, or display.

On appeal, the Citizens requested that the Court of Appeal set aside the trial court's temporary restraining order and preliminary injunction as impermissible restraints on free speech

and petition rights under the free speech petition provisions of the California Constitution. In its decision (Petition for Writ of Certiorari, Appendix pp. A16 et seq), the Court of Appeal carefully considered and evaluated separately the reasonableness of each of the Rules under the California Constitution. In fact, with respect to each rule, the Court of Appeal not only explained why it considered it to be unreasonable but has also suggested an alternative rule which it believes accomplishes the same business purpose.

Specifically, the Court of Appeal decision allows for a registration process for political petitioning, requiring applicants to give the name and address of the individual or group seeking to engage in expressive activity; the name and "identification" number of the person "in charge"; the "nature" of the political petition for which signatures are sought; the date and time applicants wish to engage in petitioning activity; whether written literature will

be distributed; the names of persons who will participate and a telephone number for contact. The decision simply does not allow the Plaza to have unwritten, subjective and unfettered discretion as to whether an application will be accepted.

The decision also upheld the Plaza's registration fee and allowed management reasonable discretion to designate areas for free speech activities and to choose the number of petitioners and the time for petitioning as long as there are objective written criteria. Similarly, the decision allows for management approval of the furniture, signs, mechanical equipment and musical instruments used by petitioners as long as the decision is based on written and objective criteria.

The decision, for the most part, strikes a reasonable and balance between constitutional rights and economic interests. If anything, the decision is too deferential to the economic interests of the Plaza and insufficiently

protective of citizens' constitutional rights. The Court of Appeal upheld the Plaza's prohibition against any political activity during the Christmas holiday and upheld the absolute prohibition against solicitation of contributions. The Court of Appeal did this despite little or no evidence to show that these prohibitions actually protected legitimate business interests of the Plaza.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners have asserted that the question presented by their appeal is as follows:

"Whether application of the 'least restrictive means' standard to time, place and manner rules promulgated in good faith by the management of a privately-owned shopping center results in a taking without just compensation in violation of the private property owners' rights under the Fifth and Fourteenth Amendments?" [emphasis added]

The question presented by petitioners is misleading because the

Plaza is not a pure private shopping center but rather is a quasi-public situs. Furthermore, petitioners seek to have this Court grant plenary review of the Court of Appeal's decision which reversed the trial court's granting of a temporary restraining order and preliminary injunction. This Court's practice, however, is not to review cases prior to a final decree, "except in extraordinary cases." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

A. The Plaza's Tax-Supported Status Makes It A Quasi-Public Entity Rather Than A Purely Private Shopping Center Consequently, This Is Not The Appropriate Case To Reconsider Pruneyard.

In its petition for a writ of certiorari, the Plaza has attempted to resurrect the same red herring it put before the trial court and the Court of Appeal. The Plaza argues that the traditional constitutional protections afforded free speech and free petition rights are not applicable to it because

it is not a quasi-governmental entity but rather strictly privately-owned. However, the well-documented interdependence of the Plaza with the City of Pasadena warrants the conclusion that the City is a joint participant in the promulgation of the Plaza's overly restrictive rules -- which make this an inappropriate case to consider the continuing viability of Robin v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), aff'd sub nom, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 64 L.Ed. 2d 741 (1980) ("Pruneyard").

It would clearly be inappropriate to reconsider the Pruneyard decision based upon the facts of this case. Unlike the mall in Pruneyard and the line of cases which precede it, this case does not involve a mall which acquired its public status solely from the manner in which it was used by the public. Instead, the tax-supported status of the Plaza makes it a quasi-public entity regardless of how the public uses its facilities.

The interconnectedness between the Plaza and the City of Pasadena was noted in the Court of Appeal decision (Petition for writ of Certiorari, Appendix pp A15-A16) as follows:

"The appropriateness of applying the traditional analysis of time, place and manner regulations to the instant matter is reinforced by the distinction between the Plaza and the privately-owned "quasi-public" forums identified in Hoffman, Diamond I and Robins. In each of those cases,the facility and the land upon which it stood were wholly owned by private enterprises which acquired their "quasi-public" status solely from the manner in which the facilities were used. In contrast, the Plaza does not own the land upon which it stands or the three underground parking garages which accommodate its customers. The city exercised its powers of eminent domain to permit the development of the Plaza and financed construction of the parking facilities through its redevelopment agency; the Plaza pays rental fees for

the use of the parking facilities.

The integrated nature of the publicly-owned land and parking structures and the privately-owned Plaza has been commented upon previously. (See Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal. App. 3d 631, 634-635.) When a public entity so far insinuates itself into a position of interdependence with the private enterprise, the public entity becomes a joint participant in challenged activity. (Burton v. Wilmington Pkg. Auth. (1961) 365 U.S. 715, 725.) In these circumstances, it is clear the constitutionality of plaintiffs' regulations must be assessed by "a balancing of interest and a determination that [the party] has used the 'least restrictive means' to regulate the conduct in question." Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 517.)"

The single largest components of the Plaza are three publicly-financed parking garages located directly under and on either side of it. The ground under the

Plaza is owned by the Pasadena Community Development Commission (hereinafter "PCDC""), a redevelopment agency as defined by the California Community Redevelopment Law (Health and Safety §33000 et seq.). The Plaza pays rental under a lease from the PCDC to use the three publicly-owned parking facilities physically attached to it. Additional property tax revenues help to pay the ongoing debt for the parking structures. The Plaza is located on a block south of Pasadena City Hall, and it is interposed in location amidst the Pasadena Civic Center. City Hall is one block north and the Pasadena Conference Center and Civic Auditorium are adjacent to the south of the Plaza.

The peculiarly interconnected nature of the Plaza with the public parking garages is a central adjudicated fact in Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 164 Cal. Rptr. 56 (1980), cert. den., 449 U.S. 983 As a party to that action, the Plaza (Ernest W. Hahn, Inc.) is collaterally estopped

concerning the factual findings therein. In Graydon, the plaintiff challenged the lack of public bidding for the construction contracts for the Plaza's parking garages. The Plaza and the Pasadena Redevelopment Agency (predecessor to the current PCDC) proved the peculiar interconnected nature of the public parking garages and the Plaza; the Court held, based in part on such proof, that no competitive bidding was required. The case determined, inter alia, the following facts:

"To finance the public cost of the retail shopping center development for acquisition of land, demolition of buildings, relocation of residents and businesses, and construction of required parking facilities comprised of a subterranean garage beneath the shopping center and two above ground parking structures, the Agency sold tax allocation bonds in the principal amount of approximately $58 million." Graydon, supra 104 Cal. App. 3d at 634 [emphasis added].

"The respondents' [including Ernest W. Hahn, Inc.] answers alleged that competitive bidding was not required in this case for the construction of the subterranean garage because of the integrated nature of that garage and the major retail center; that the purposes of competitive bidding would not be accomplished and because construction of that garage without competitive bidding would be advantageous and in the public interest." Graydon, supra, 104 Cal. App. 3d at 635 [emphasis added].

"The negotiated contract for the constitution of the subterranean garage is an integral part of the whole method of financing the public costs associated with the retail center. The financing is by bonds issued by the Agency to be paid from tax increments allocated to the Agency.

. . .

The ability of the Agency to pay its bonds, dependent in large part upon the flow of tax increment monies resulting from the completion of the retail center,

was thus directly linked to the award of the questioned contract." Graydon, supra, 104 Cal. App. 3d at 645 [emphasis added].

In its construction, financing and operation, the Plaza is a joint participant with the government and thus cannot deny its governmental responsibilities. The Plaza should not be allowed to enjoy the benefits of its relationship with the City of Pasadena (e.g. avoiding competitive bidding), without accepting the responsibility it has to make reasonable accommodations for free speech activity.

The question of "private" versus "state" action is clearly a spurious issue. The Plaza, due to its peculiar interconnectedness with public financing and facilities, is an extension of the government. Its denial of free speech and petition rights is, in effect, a governmentally-sponsored suppression of constitutional rights. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L. Ed. 2d 45 (1961)

held racial discrimination in the context of state subsidized commercial activity was state action. It is state action despite the private business' total control and management of its commercial establishment. In Burton, Justice Tom Clark wrote for the Court:

"[It] cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits . . . [Neither] can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but are indispensable elements in, the financial success of a governmental agency.

. . .

. . . [I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the 14th Amendment imposed upon the private enterprise as a

consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied by equal protection of the laws that it was done in good faith. . . .[B]y its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service,but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the 14th Amendment." Burton, supra, 365 U.S. at p. 725 [emphasis added]

Constitutional rights of expression are of equal dignity with equal protection. There is no distinguishing

feature between governmental conduct that racially discriminates and governmental conduct that suppresses free speech. The Plaza's refusal to allow free speech is equivalent to a refusal to admit persons who happen to be black, Jewish, or female. Such unconstitutional actions must be condemned.

As the decision of the Court of Appeal noted, the interdependence of the Plaza and the City of Pasadena makes them joint participants in the challenged activity -- the promulgation of the Plaza's rules. This conclusion is not contradicted, as the petition herein spuriously argues, because the Plaza may have the rights to the air space above the garage.

B. The Posture Of This Case Makes It Premature And Inappropriate For Plenary Review.

Petitioners seek to have this Court grant plenary review of the Court of Appeal's decision setting aside the trial court's issuance of a preliminary injunction. This Court's practice,

however, is not to review cases prior to a final decree, "except in extraordinary cases". Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). The posture of this case demonstrates the wisdom of avoiding plenary review prior to the development of a full factual record and consideration of the legal arguments by the courts below in the first instance.

The litigation herein arose from an attempt by the Citizens to apply for the right to exercise their free speech and petition rights as guaranteed by Pruneyard. When the Citizens sought to gather signatures for their petition at the Plaza, it refused to even accept a registration form on the claim that the Plaza had an unwritten rule that there could be no political activity in the Plaza "during the holiday season." The Plaza continued subsequent after the holiday season to restrict political speech and petitioning by insisting on enforcing its "Rules for Political Petitioning on Shopping Center Property"

(the "Rules"). Although there was never any attempt to conduct speech and petition activity without the Mall's permission, the Plaza sued the Citizens to compel them to obey its rules. The Citizens counter-sued, asserting the Plaza's rules were constitutionally defective because they involved a prohibition on non-petitioning activity, a limitation to adults, unwarranted imposition of liability an improper deposit requirement, overly-broad time, place and manner restrictions, restraints on content of speech and solicitation of contributions, restrictions on approaching voters and a power to require insurance. The Citizens also brought suit against the City of Pasadena, based upon the City's legal status as a joint participant in the constitutionally impermissible rules promulgated by the Plaza. Immediately upon the filing of its complaint against the Citizens, Hahn sought, and was granted, preliminary injunctive relief by the trial court. The Court of Appeal decision concerns the

propriety of that interim relief.

Thus, the Court of Appeal's decision did not reach many of the merits of the substantive claims in the actions herein. This case is now before the Court without the benefit of the substantial further discovery which will occur prior to trial, and thus the issues raised by petitioners are not presented with the "clarity, precision and certainty" that would be provided by a fuller record. Rescue Army v. Municipal Court, 331 U.S. 549, 576 (1947); Accord, Socialist Labor Party v. Gilligan, 406 U.S. 583, 588, n.2 (1972). In fact, cross-defendant City of Pasadena has yet to respond to the cross-complaint in this action (operating under an agreement with the Citizens for an open extension of the time to respond to their cross-complaint, pending final resolution of the appeal herein).

Petitioners have asked the Court to reconsider the entire line of cases which precede and follow the Pruneyard decision. However, they have asked the Court to do this without a complete

factual record. The Pruneyard line of cases are, to a large extent, based upon judicial notice of facts which characterize modern shopping centers. The Court should not set aside Pruneyard and its progeny based upon petitioners self-serving supposition that those essential facts have changed.

C. Pruneyard Should Not be Reconsidered

Even assuming arguendo that the Plaza was a purely private shopping center, the petitioners have not established a sufficient basis for the reconsideration of Pruneyard. In Pruneyard, this Court, by Mr. Justice Rehnquist, held that state constitutional provisions which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited did not violate the shopping center owner's rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments. As this Court noted in

Pruneyard, supra, 447 U.S. at p. 2041.

"...[I]t is well established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.' Armstrong v. United States, 364 U.S. 40, 48, 80 S. Ct. 1563, 1568, 4 L.Ed.2d 1554 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property "force[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id., at 49, 80 S.Ct., at 1569. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. Kaiser Aetna v. United States, supra, at 175, 100 S.Ct., at 390. When "regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon,

260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The Pruneyard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large."

As was the case in Pruneyard, there is nothing in the instant case to suggest that the value or use of petitioners' property has been impaired by the Court of Appeal decision. Furthermore, there is clearly an insufficient factual record below for the Court to make an

examination into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations as required by Pruneyard. Thus, given the lack of a full factual record in the litigation below, the Court should not use this petition to reconsider Pruneyard, even if the Plaza were a purely private shopping center, which it is not.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

DATED: February 26, 1988

Respectfully submitted,

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